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In the

Supreme Court of the United States

October Term, 1980

Docket No. _____

MARY LEMONS, MARGARET D. LEWIS, MARILYN SHAHAN, LOIS CADY, SHARON SHUMWAY, DOLORA COTTER, ANN JUMPER, JEAN MITCHELL, JUDITH IVES, individually and on behalf of all others similarly situated,

Petitioners,

against:

THE CITY AND COUNTY OF DENVER, CAREER SERVICE AUTHORITY, CITY AND COUNTY OF DENVER, WILLIAM McNICHOLS, Mayor of the City of Denver, F. ARNOLD McDERMOTT, personnel director and chief executive officer, Career Service Authority, FRANCIS H. SALTER, Chairperson, Career Service Board, MARIAN H. ROSSMILLER, vice-chairperson, Career Service Board, RICHARD L. HARTMAN, member of the Career Service Board, WILLIAM R. GREENWOOD, member of the Career Service Board, JOHN DOE, member of the Career Service Board, and EDWARD F. BURKE, JR., President of the City Council of the City of Denver.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Mary Lemons, Margaret D. Lewis, Marilyn Shahan, Lois Cady, Sharon Shumway, Dolora Cotter, Ann Jumper, Jean Mitchell, Judith Ives, individually and on behalf of all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 21, 1980.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (Winner, C.J.) is not officially reported, but is found at 17 FEP 906 (1978) and at page A-1.* The opinion of Chief Judge Seth for the Tenth Circuit Court of Appeals, not yet officially reported, appears at page A-25.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1980 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a six hundred (600) year history of sex segregation and resulting unequal pay qualify nurses for consideration under principles decided by this court proscribing expansion of historic discrimination; that is, does the principle of *Griggs v. Duke Power* apply to females who prove a specific, harsh and segregated history as well as to blacks?

2. Where sex is shown by circumstantial evidence to be the organizing standard for a city's pay system does the use thereof violate Title VII of the Civil Rights Act of 1964, §703 (a) (2)?

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*References in this form are to the Appendix annexed hereto.

3. After proof of sex as the organizing standard of a pay system may a city shift the burden of proof back to plaintiffs by mere allegations of good faith and meeting competition or must there be some specific rebuttal of the prima facie case?

4. Can disparate "impact", as defined in *Furnco v. Waters,* be shown in a sex discrimination case in terms of the differences between compensation paid to men and women occupying jobs of comparable worth?

5. Does the Equal Pay Act, 29 U.S.C. §206(d), relieve a defendant in a sex discrimination case of any requirement to rebut evidence introduced to prove illegal classification contrary to Title VII §703(a)(2)?

STATUTES INVOLVED

42 U.S.C. §2000e-2 and 29 U.S.C. §206(d) set forth at pages 1-3 of Appendix B to this petition.

STATEMENT OF THE CASE

A. Facts

These plaintiffs were nurses employed by the City of Denver. They were classified for pay purposes in a cluster of jobs the salaries for which are based upon a survey in the private sector. As a result of hundreds of years of sex segregation in nursing, salaries in the private sector are depressed and the salary curve, or that is, the range of possible salary increase within jobs, is flattened. These historical disadvantages are not only mimicked by Denver's pay system, but are affirmatively recreated when objective formulas otherwise enforced for male occupations are discarded for nursing. There is thus an affirmative re-creation of the historic disadvantage in that instance where modern pay practices would tend to screen that disadvantage out.

The modern pay practices used by the City to the benefit of male job classes include grouping of jobs for pay purposes according to educational levels, use of an inter-

quartile formula for setting the range of possible salary increase for male jobs, and use of job worth or functional analyses for the grouping of jobs. These modern practices are not used consistently for nurses or are used only in such a way to confirm predispositions toward depressed wages for this female profession. Objective criteria to screen out sex discrimination in the grouping of jobs are claimed but are not followed. Such standards thus become a disguise for what is, in fact, a highly subjective, flexible pay system which operates on the basis of sex stereotypes.

Evidence of the sex stereotyping is reflected circumstantially in the following: For pay purposes the city organizes approximately seven hundred sixteen (716) job classes into approximately thirty-five (35) pay groups. The vast majority of these groups, (considering actual incumbents in 1974 and 1977), are substantially male or female. Male jobs are typically related to male jobs for pay purposes. Female jobs are likewise lumped together and receive, on the whole, substantially lower pay as a result.

The tendency to group jobs by sex is further reflected in the fact that throughout the male groupings there is substantial educational homogeneity (as required by the printed job descriptions). For example, in 1977, a carpenter's grouping was one hundred percent (100%) male incumbents and one hundred percent (100%) of the jobs in that group were required to have one year (or less) post high school education. In that year, also, the Civil Engineer IV group was ninety-nine percent (99%) male, (actual incumbents of all jobs in that group), and ninety-seven percent (97%) of these jobs required as a prerequisite, four years college education. This use of education however, as an organizing standard while customary for male jobs, is not followed in nurse groups, or several other female dominated groups. Rather, sex becomes the organizing standard and, in nursing and the other female groups sex overrides education as the organizing principle. These groups are

predominantly female but do not reflect educational homogeneity at all. Thus the stereotype idea that jobs are similar because they are of the same sex overrides the modern practice of goruping jobs by education levels.

Similarly, the modern practice of grouping jobs because of functional similarities is followed for the benefit of male job classes but nurses are grouped together whether or not there are functional similarities because of the stereotypical assumption. For example, in 1977, the City grouped many accountants together and related them for pay purposes. Top level accountants, however, having administrative responsibilities were not included in the "Accountant I" group; they were, instead, put in a management group entitled "General Administrative Series IV". Recognition was given to management requirements for these one-hundred percent (100%) male jobs. Again, for example, physicians without administrative responsibility were put in one group, and physicians with administrative responsibilities were put in another group, deemed functionally similar. (These groups are eighty-eight percent (88%) and ninety-seven percent (97%) male incumbency). Recognition was given for administrative management similarities. Functional analysis of jobs is a modern practice, and was put into effect here for male jobs.

Nurses, by contrast, were grouped together and top-level administrative nurses having responsibilities for millions of dollars of management were not grouped for pay purposes with other administrators. Instead, they were grouped by reason of stereotype with other females. Their salaries are lower as a result.

These facts and others of a similar nature are circumstantial evidence that sex is used as the effective organizing standard of the City's pay system.

The result of this unconscious sex grouping is that salary in the City's system tracks maleness. On the whole,

with few exceptions, a job class that is forty percent (40%) male, actual incumbency, is paid less than a job class fifty percent (50%) male, which is paid less than a job class sixty percent (60%) male, and so on. The City, therefore, has a highly tuned system which actually adjusts wages up as male incumbency increases. Of the over seven hundred jobs, only thirty-five (35) of these are paid based upon an actual survey of the private sector. The remainder are based upon a judgment which has little or nothing to do with supply and demand and is based upon detail knowledge of the sex composition of each class.

A comparison of nursing salaries to the salaries of male jobs required by the City to have the same prerequisites in terms of education, supervisory responsibility and experience and a second comparison based upon objective factors in a professional job worth analysis, show that the result of reliance upon sex stereotypes and use of sex as an organizing standard is lower wages (by thousands of dollars) for nurses than for jobs similarly situated in terms of comparable worth.

B. Decisions Below

The case was tried in the U.S. District Court for Colorado, in April 1978, and a decision was announced from the bench at the end of trial. Chief Judge Fred M. Winner did not discuss the facts described herein, nor treat of the evidence of sex stereotyping in any way. Neither did he discuss the application or non-application of *Griggs v. Duke Power,* 401 U.S. 424 (1971) or any of the subsequent disparate impact cases. Neither did he discuss the application or non-application of cases regulating sex stereotyping, use of subjective standards or standards applicable to the burden of proof in a disparate impact case. The court treated good faith, or that is, lack of proof of conscious, intentional discrimination as dispositive, rendering unnecessary an evaluation of the actual impact of the City's stereotype-ridden system.

On April 21, 1980, the Tenth Circuit held that Title VII of the Civil Rights Act of 1964 does not extend to jobs deemed underpaid as a result of job worth analysis and the Court did not discuss or refer to the evidence that the City conducts such analysis with an uneven hand, nor did the Court refer to evidence of sex used as an organizing standard, nor to the conscious re-creation of historic discrimination. As at the trial level, the Tenth Court did not discuss the application or non-application of *Griggs v. Duke Power, supra,* or any of the disparate impact cases. Nor did the court discuss application or non-application of highly relevant prior decisions in this circuit relating to subjective standards, sex stereotyping and burden of proof. (*Muller v. United States Steel,* 509 F.2d 923 (10th Cir. 1975), and *Jones v. Lee Way Motor Freight,* 431 F.2d 245 (10th Cir. 1970)). The plaintiffs have not yet had a decision on sex stereotyping in job classification or consciousness of sex and the impact thereof upon their salaries. Instead, the trial Court required proof of overt discriminatory intent and the Court of Appeals held that Title VII does not reach such facts unless bad faith is shown. With the exception of a finding of good faith, neither court has offered any analysis of the record as a basis for its conclusions.

REASONS FOR ALLOWANCE OF THE WRIT

1. The case presents for the first time to this Court the question whether circumstantial evidence of sex stereotyping will support a claim under Title VII of the Civil Rights Act of 1964, §703(a)(2).

2. There is a split between circuits as to the extent to which Title VII of the Civil Rights Act of 1964 is or may be limited by provisions of the Equal Pay Act, 29 U.S.C. §206(d). This Court in *General Electric v. Gilbert,* 429 U.S. 125 (1976) and *Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702 (1978) applied standards of Title VII without reference to the Equal Pay Act,

implying a separation and no limitation except in the specific instances authorized by §703 (h). The Ninth Circuit in *Gunther v. County of Washington*, 602 F.2d 882, (9th Cir. 1979), explicitly held that Title VII is broader than the Equal Pay Act. *Accord: Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) and *Fitzgerald v. Sirloin Stockade, Inc.*, ___ F.2d ___, 22 E.P.D. ¶30,724. (10th Cir., 1980). The Tenth Circuit, however, in the instant case, and the Eighth Circuit in *Christensen v. Iowa*, 563 F.2d 353, (8th Cir. 1977), have held that females cannot claim more or differently under Title VII than they might under the Equal Pay Act, at least under the circumstances of these cases.

3. There is a need for clarification by this Court of the burden of proof requirement in a *Griggs*-type disparate impact case. The trial court in the instant case attempted to force a *McDonnell Douglas v. Green* analysis and expressly stated: "I don't know how . . ." (Appendix, p.A-11). This Court in *Griggs* and repeatedly thereafter has implied that proof of historic discrimination against a protected class, plus an affirmative act of recreation of such impact by the employer in circumstances allowing for non-discriminatory alternative practices plus a widely disparate impact upon plaintiffs of the practice (even though the same may be neutral on its face) is sufficient to state a cause of action and to shift the burden to the employer to show why the practice is necessary for safe and efficient operation. The nurses' present situation derives from an ancient history not dissimilar in its salary impact to that applicable to blacks, and there has been no decision expressly extending or limiting the *Griggs* principle to women such as nurses who are able to document and prove intentionally sex-segregated employment history. The absence of such decision leaves the issue confused and neither employees nor employers are presently able to determine the extent of their rights or obligations. Female professions which

have been, if effect, ghettoized by overt discrimination in the past are, also, distinguishable from those not having been consciously segregated. The principle, therefore, which distinguishes professions descending from practices intended to discriminate against women from those evolving without such intent warrants clarification at the highest level.

ARGUMENT

I

The Court of Appeals erred applying a good faith test to a disparate impact case brought under Griggs v. Duke Power and thus was guided by evidence which this Court has previously declared irrelevent.

Since the beginning of the development of modern law on the subject, this Court has stricken the use of overbroad generalizations, or stereotypes, about men and women. Beginning with the Fourteenth Amendment cases and consistently under Title VII the Court has held that capacities or liabilities of any individual may not be predicted by sex alone. (*Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), *Dothard v. Rawlinson*, 433 U.S. 321 (1977), *Craig v. Boren*, 429 U.S. 190 (1976), *Weinberger v. Wiesenfeld*, 419 U.S. 822 (1975), *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Reed v. Reed*, 404 U.S. 71 (1971)). This long list of decisions has produced an unambiguous, clear and firm statement of American law summed up by Justice Stevens in *Manhart:*

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a . . . sexual . . . class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.
> *Id.*, p. 708.

In the tradition of Western Europe which was transmitted to this country there was prejudice against females in medicine. They were seen as competitors with physicians who were male. There developed a segregation of professions, and women were restricted to nurturing and caring and cleaning up while males were allowed to undertake curative and analytical work. The name "nurse" was synonymous with an exclusively female biological function and the role was stereotyped as exclusively female. For a long time it was not a paid profession. There was, therefore, a long historical evolution in which no pay or low pay for females paralleled sex segregation in medicine. The practice of segregation was, therefore, instrumental in keeping the cost to employers down. In modern times, recognizing this, Florence Nightengale offered her nurses as free trainees to hospitals in return for the privilege of serving in the male world of medicine. The result of this history is a twin stereotype in nursing of femaleness and low pay. The unrebutted record in this case reports this history.

The City of Denver, in reliance upon these historical stereotypes, groups nurses with other female job classes for pay purposes. The City claims good faith reliance upon other criteria. Simple arithmetical analysis, however, belies the excuse. In 1977, jobs were titled and organized by the City in such a way that women and men were substantially sex segregated. Of seven hundred sixteen (716) job classes, four hundred eighteen (418) were defined in such a way as to allow for *one hundred percent* (100%) male incumbency. Further, the City organizes jobs into clusters for purposes of salary setting. Women's jobs are, because of stereotyping, clustered with other women's jobs. Over eighty-five percent (85%) of all women in City employployment were included in clusters, seventy-five (75) to one hundred (100) percent female.

There is, also, a different use of modern organizational criteria for men than for women. Management skills, for

example, used as a basis for clustering male jobs in medicine such as Health and Hospital Controller, the Health Center Administrative Officer, or the Director of Medical Services are not used for management nurses who are grouped with entry-level vocationally trained nurses.

Similarly, certain job clusters are split up, that is, treated flexibly, for the benefit of males, while such flexibility is not used to benefit nurses (female). A cluster of accountants, for example, does not include top-level, management accountants who are instead clustered in a "General Administrative Series" with higher salaries. Management nurses, by contrast, are not put in the General Administrative Series but are clustered in a group of eighty-seven percent (87%) female incumbency including many job classes which require no supervisory skills or higher education. This pay system has adopted and reflects the ancient stereotypes of femaleness and low pay for grouping purposes. The discrepant application of standards of organization discriminates against nurses.

Consciousness of sex and historic, inherited discrepancies between male and female salaries is further reflected in the fact that the more males there are in a job class the more the City pays. A job of sixty percent (60%) male incumbency is typically paid more than a job of fifty percent (50%) male incumbency, and so on. Under Denver's management, salary increases as maleness of a job class increases.

This and other evidence of the use of sex stereotyping as a grouping standard was held, in effect, to be irrelevant by the Tenth Circuit in its decision below because of the City's "good faith". (Slip opinion, Appendix p. A-26). Neither the Court of Appeals nor the trial court, however, discussed or applied the tests required by this Court in *Griggs v. Duke Power* 401 U.S. 424 (1971). Under *Griggs* good faith is not relevant:

> Under the Act, (i.e. §703 (a) (2)), practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices. (401 U.S. at p. 430).

The nurses in this case proved the use of stereotypes running back to medieval times. This history was admitted by the trial court. (Appendix p. A-7, 10, 19, 25). This was, therefore, a case in which the nurses showed a foundation of discrimination based upon stereotypes similar to that in *Griggs*.

The City's classification practices, including use of sex as an organizing standard, use of subjective evaluations, stereotypes, and uneven application of standards are practices which appear neutral on their face. That is the first test of a *Griggs*-type disparate impact case. Second, these practices produce their evil effects because of their tendency to expand and ramify a discriminatory history. In *Griggs* that was a history of race discrimination and low wages which was perpetuated by the usage of applicant testing procedures. In *Lemons* there is a history of sex discrimination and low wages which is perpetuated by the subjective classification system of the Career Service Authority.

Finally there is the test of impact. Does the practice complained of fall more heavily upon the Title VII protected class, in this case nurses (ninety-seven percent (97%) of whom are female), than upon others? In *Griggs* the answer was, yes, the applicant testing procedure presented more of an obstacle to employment for blacks than for whites. In *Lemons* the answer is, also, yes, the subjective classification system is more of an obstacle to pay advances for nurses than for males.

The City's system produces sex-segregated key class pay groups. The adverse impact is upon the females. Since

female salaries are traditionally and predictably lower than male salaries, the grouping of females together guarantees that females' salaries will be linked to low level salaries and stay low level. This is the pattern of the centuries. This is the historic cycle the Congress sought to break with the enactment of Title VII. It is precisely the disproportionate impact of a practice upon females which is the equivalent of the disproportionate impact of testing upon blacks which was disallowed in *Griggs*.

Because of this key class grouping system nurses suffer hundreds of dollars salary disadvantage every month. The exact amount of such disadvantage was detailed for 1974 and 1977. The evidence was offered in approximately one hundred and fifty (150) graphs, charts and statistical analyses and was not rebutted. Neither court below, however, considered this evidence because neither considered the *Griggs* line of cases.

The impacts of this sex-conscious system are therefore two:

1) It groups and segregates women's job classes with women's job classes, eliminating the leavening advantage that would occur if the men's and women's groups were integrated, and

2) it produces significant salary discrepancies between nurses' and men's jobs similar in terms of comparable job worth.

The City seeks to justify this system because City nurses are paid as much as other nurses. That is to argue that the Duke Power Company could have defended itself in *Griggs* by demonstrating that it paid a wage to its blacks as great as that paid on the average by other employers to blacks, or that is, to argue that the City of Denver could pay to its black employees an average wage based upon average wages for blacks in the metropolitan area.

The City could not do that. Nor can it pay nurses (female) who have suffered six hundred (600) years of salary discrimination wages equal to those of other, similarly-discriminated-against nurses, (female).

II

The Court of Appeals erred affirming a McDonnell Douglas v. Green burden of proof test on facts having nothing to do with employment applications or disparate treatment as that concept is customarily applied.

The gravamen of the disparate impact cases is the forbidden rehabilitation and perpetuation of historic discrimination, and that is the forbidden conduct protested here. The trial court's reliance, and Tenth Circuit's affirmation, of the *McDonnell Douglas* test and the requirement of a showing of intent, are simply inapposite. It is given in this kind of case that the practices complained of are neutral on their face. No intent need be shown. *Nashville Gas v. Satty*, 434 U.S. 136, (1977). And the rebuttal of the nurses' showing of a practice which, because of discriminatory history, has a disproportionate impact upon women, is not accomplished by showing a legitimate non-discriminatory reason, but requires rather, a "business necessity", or a showing that the practice is "necessary to safe and efficient job performance". *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The Court of Appeals offers no discussion of those principles which govern this case.

The trial court expressly found a history of sex discrimination against nurses. (Appendix, p. A-10). Instead, however, of applying a *Griggs* analysis it attempted to squeeze the case into the confines of *McDonnell Douglas v. Green,* 411 U.S. 792 (1973), in effect saying, "I don't know whether it applies or not," and "I don't know how to apply the language of *McDonnell Douglas* but I'll try." (Appendix pp. A-10, 11). The trial court did not have the benefit

of the language of *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), which spelled out clearly and perhaps for the first time the distinction between disparate impact and disparate treatment cases. The Court of Appeals did, however, have the benefit of *Furnco* and nevertheless erroneously ignored the direction thereof to apply an impact analysis to this case.

III

The Court of Appeals erred affirming the use of the wrong test for rebuttal of a prima facie case, holding that meeting competition was justification for discrimination when the test should have been whether this practice was necessary to safe and efficient job performance.

The nurses complain of a pay system in which a de facto dependence on sex stereotypes leads to salary disadvantage. Neither the trial court nor the Court of Appeals evaluated the disproportionate impact of these stereotypes upon the females in this case. From that first mistake followed, secondly, an incorrect burden-of-proof holding, as described above. Thirdly, both courts ignored the long-standing requirements for rebuttal of the prima facie case.

> The employer must meet the burden of showing that any given requirement (has) . . . a manifest relation to the employment in question. *Griggs v. Duke Power*, 401 U.S. at 432. *Dothard v. Rawlinson*, 433 U.S. 321, (1977).

A "manifest relation to the employment in question" is customarily described as the doctrine of "business necessity" and has been widely followed.

In *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971. *cert. denied* 404 U.S. 1006 (1971), the Fourth Circuit explained that a defendant must prove the following with regard to its alleged business purpose in order to establish a successful business necessity defense:

> First, it must represent "an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business";
>
> Second, it must be "sufficiently compelling to override" the discriminatory impact;
>
> Third, "the challenged practice must effectively carry out the business purpose it is alleged to serve";
>
> and
>
> Fourth, "there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . impact".

Robinson, supra, 444 F.2d at 798. See also *United States v. Bethlehem Steel Corp.,* 446 F.2d 652,662 (2d Cir. 1971). Furthermore, this Court has recently reaffirmed the validity of the business necessity doctrine which it originally adopted in *Griggs, supra,* 401 U.S. at 431. In *Dothard, supra,* the Court stated:

> Thus for both private and public employers, "The touchstone is business necessity." *Griggs,* 401 U.S. at 431; a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge.
>
> 433 U.S. 321, fn. 14.

Neither court below applied the "business necessity" test. Both ignored that requirement. Nor did either court examine alternatives, as required. Instead both applied the test — remarkable in a discrimination context — of "meeting competition". Thoughtfully considered, it is clear that a "competition" test provides a complete nullication and vitiation of the Civil Rights Act. Competition honors dis-

crimination and perpetuates it. Such a test would frustrate the entire purpose of the Civil Rights Act of 1964 which was to break the lock on the marketplace of those customs perpetuating discrimination.

IV

The Court of Appeals erred applying standards of the Equal Pay Act to a classification case brought under §703(a)(2) of Title VII of the Civil Rights Act.

The Court of Appeals held that the facts of this case were governed by the standards of the Equal Pay Act, 29 U.S.C. §206(d) (1963). To reach this conclusion it held that Title VII of the Civil Rights Act of 1964 provided no relief additional to the earlier act, and was, as to sex claims, co-extensive. The nurses claimed the use of sex as an organizing standard for the City's pay system, that is, that sex consciousness and sex stereotyping was part of the fabric of the City's classification scheme. Both lower courts, however, held that no challenge to classification practices is available in this case. The nurses' claims were not considered by either lower court under §703(a)(2), and there is no discussion thereof in either lower court opinion. Both held that if a §703(a)(2) claim results in pay discrepancies also recognizable under §703 (a) (1), the claim also *must* be cognizable under the Equal Pay Act. Thus, the holding is, in effect, that a §703 (a) (2) case may not stand alone if the outcome has pay ramifications. This is a drastic narrowing of the Civil Rights Act, a carving out of a whole section, without basis. In effect it nullifies §703 (a) (2) because almost no case is absent pay ramifications.

The Bennett Amendment, §703 (h) of the Civil Rights Act of 1964, contains the injunction that it shall not be unlawful for an employer to differentiate upon the basis of sex in determining wages or compensation "if such differentiation is authorized by the provisions of [the Equal Pay Act.]" (Appendix, p. B-2). Nothing, however, in the

Equal Pay Act authorizes a classification system which recreates sex stereotypes, uses sex as a de facto organizing standard, uses different standards for men than for women, uses modern employment practices to create flexibility for men but not for women. That is, nothing in the Equal Pay Act addresses discrimination in classification which is the grievance of the nurses in the present case. In a nutshell, the Bennett Amendment is not relevant to the claims of this case, because it limits Title VII only to the extent of actions "authorized" by the Equal Pay Act, and that Act does not "authorize" stereotypical classifications, nor, indeed, does it address the subject of discriminatory classification.

This Court has repeatedly decided sex claims under Title VII without consideration of the Equal Pay Act. *See, for example, Los Angeles Department of Water and Power v. Manhart,* 435 U. S. 702 (1978), and *General Electric v. Gilbert,* 429 U. S. 125 (1976). These decisions establish the firm precedent that Title VII is not limited by the Equal Pay Act where the facts raise questions of gender-based discrimination. By implication therefore, Title VII is limited by the Equal Pay Act *only* where the overlap is explicit, i.e., only where a decision under the one would manifestly be possible also under the other and the two must be deemed to that extent compatible.*

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*When there is obvious overlap, the two may be read in harmony because to do otherwise would lead to different results depending only upon which statute may have been pleaded, an outcome Congress may have intended by the Bennett Amendment to avoid. Thus, when there is overlap, there should also be consistency. See, for example, *Ammons v. Zia Company,* 448 F. 2d 111 (10th Cir. 1971). In that case a female challenged a pay practice on the ground that she was doing work equal to certain males and should be equally paid. This was a claim which could have been brought under either the Equal Pay Act or Title VII and the Tenth Circuit concluded that the Bennett Amendment was intended to produce the same result under Title VII — in this narrow circumstance — as would be achieved under the Equal Pay Act.

In the different case, however, of a class of female employees challenging discrimination in the warp and woof of the employer's organization there is no relief possible under the Equal Pay Act. That Act does not address organization, classification, and stereotyping. There is no relief, for example, under the Equal Pay Act for the imposition of height and weight stereotypes recognized in *Dothard v. Rawlinson, supra,* as creating a Title VII claim. This Court did not, therefore, in that case deny the existence of a Title VII claim. Rather Title VII was held to address a clearly different problem, that is, the problem of sex stereotyping. Equal Pay Act requirements of equal pay for equal work were not at issue and do not influence the Title VII result. This principle is now firmly rooted in the repeated decisions of this Court.

It is clearly error, therefore, for the Tenth Circuit to hold broadly that there can be no Title VII claim which does not state also an Equal Pay Act claim. Such ruling flies in the face of contrary holdings in *Los Angeles Department of Water and Power v. Manhart, Dothard,* and *Gilbert.*

The panel of the Tenth Circuit in *Lemons,* followed a decision in the Eighth Circuit, *Christensen v. Iowa,* 563 F.2d 353 (8th Cir. 1977), but ignored four contrary decisions, one each in the Tenth, and D.C. Circuits and two in the Ninth Circuit. (*Fitzgerald v. Sirloin Stockade, Inc.,* ___ F.2d ___ 22 E.P.D. ¶30,724 (10th Cir. 1980), *Gunther v. County of Washington,* 602 F.2d 882, (9th Cir. 1979), *Manhart v. City of Los Angeles Department of Water and Power,* 553 F.2d 581 (9th Cir. 1977), and *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429 (D.C. Cir. 1976)). In *Gunther* the Ninth Circuit held that Title VII is broader in scope than the Equal Pay Act. The Court said:

> . . . Two interpretations of the Bennett Amendment are plausible. The Bennett Amendment can be interpreted to incorporate the Equal Pay Act's equal work formula into Title VII. Under this construction, Title VII and the Equal Pay Act would be coextensive in the area of sexually discriminatory compensation and a plaintiff could prove a violation of Title VII only if discriminatory compensation also violated the Equal Pay Act. Alternatively, the Bennett Amendment can be construed as simply incorporating the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII's prohibition. We find the later interpretation more persuasive.
>
> 602 F.2d at 889.

In *Manhart* the Ninth Circuit also had said:

> . . . all that the Bennett Amendment did was to incorporate the exceptions of the Equal Pay Act into Title VII.
>
> 533 F.2d at 590.

In *Laffey* the D.C. Circuit said:

> . . . a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act.
>
> 567 F.2d at 446.

And the Tenth Circuit in an opinion issued six weeks before the *Lemons* opinion by a three member panel two of whom were different from the *Lemons* panel held:

> Title VII is more broad and extensive than the Equal Pay Act.

Fitzgerald v. Sirloin Stockade, Inc., ... F.2d ....., 22 E.P.D. ¶30,724 (10th Cir. 1980).

Judge William J. Holloway, Jr., sat on the *Sirloin Stockade* panel and joined in the opinion, above, but then also joined in the contrary opinion in the instant case, saying:

> . . . to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work.
>
> 22 E.P.D. ¶30,724, at Appendix page A-27.

At this time therefore, the Tenth Circuit is divided within itself, having decided contrarily in *Lemons* and *Sirloin Stockade*, only six weeks apart. The Ninth Circuit and the D.C. Circuit are in agreement with each other and with *Sirloin Stockade*, but contrary to *Lemons* and *Christensen*. The Supreme Court in *Los Angeles Department of Water and Power v. Manhart*, *Dothard*, and *Gilbert* did not limit Title VII by the Equal Pay Act and thus held in accord with the Ninth and D.C. Circuits, and with *Sirloin Stockade*, but contrary to *Lemons* and *Christensen*.*

Because of this confusion, nurses in the instant case have been unable to achieve recognition by the lower courts that they have jurisdiction to consider those facts presented below which state a claim for illegal stereotyping in job classifications under Title VII, §703(a)(2). The courts have not reached the allegations of stereotyping because of the

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*This confusion is further compounded by the fact that the Eighth Circuit two years before *Christensen* held that comparable worth claim brought under the Equal Pay Act stated a claim for relief for males. *Board of Regents of the University of Nebraska* v. *Dawes*, 522 F.2d 380 (8th Cir. 1975). Thus the Eighth Circuit has held that there is no relief under Title VII because there is no relief under the Equal Pay Act, (in *Christensen*), and, to the contrary, that there *is* relief under the Equal Pay Act, in *Dawes*, from which one would infer that there is also relief under Title VII. The Eighth Circuit is also therefore divided within itself on this issue.

mistaken position that Title VII was applicable only to require equal pay for equal work.

If Title VII were meant, in 1964, to accomplish only what the Equal Pay Act had achieved one year earlier, in 1963, it would have made no sense to pass the later law. The 1964 Statute was a reasonable act only if it added to the earlier one, or subtracted, or amended. On its face, Title VII adds, proscribing discrimination in employment "practices", and makes it illegal to "limit, segregate, or classify" employees in a way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect one's status as an employee. The Tenth Circuit offers no explanation for narrowing Title VII by ignoring this language of §703(a)(2) or for holding contrary to the firm holdings of this Court in *Los Angeles Department of Water and Power v. Manhart, Dothard,* and *Gilbert, supra.* In sum, the Court below applied the standards of the wrong statute, contrary to other rulings in and out of the Circuit and contrary to rulings of this Court.

Compounding this error, the lower courts required the wrong proof. They ignored the disparate impact cases. They applied the wrong test of the prima facie case. They allowed rebuttal in accordance with the wrong *McDonnell Douglas* test rather than *Dothard v. Rawlinson.* They exonerated a sex-stereotyped classification system without requiring a showing of business necessity, or that the same was necessary to safe and efficient job performance. In effect, both lower courts ignored proof of illegel stereotyping and classification, of practices tending to have a disparate impact upon nurses (female), and did so primarily because of reliance upon the wrong statute, the Equal Pay Act. The Equal Pay Act was not pleaded, proof in satisfaction thereof was not offered and nevertheless each Court below applied it. In so doing they essentially declared that they do not have jurisdiction to treat this case under Title VII, §703(a)(2),

and neither Court, therefore, treated the segregation, classification and stereotyping evidence.

As the law now stands, in the Tenth and Eighth Circuits, depending upon the panel drawn, there has been a judicial narrowing of Title VII, but in the Ninth and D.C. Circuits the law remains as a comprehensive remedy for women who are victims of employment discrimination — as originally passed. The nurses therefore bring this petition seeking to clarify their rights and the rights of women under Title VII to prove illegal segregation and classification as a result of sex stereotyping.

CONCLUSION

The Court of Appeals and trial court required the wrong proof to meet the wrong burden, allowed the wrong rebuttal, and applied the standards of the wrong statute. In effect, the error was comprehensive. For these reasons the petition for certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion of the District Court
(Dated April 28, 1978)

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

76 W 1156

MARY LEMONS, MARGARET D. LEWIS, MARILYN SHAHAN, LOIS CADY, SHARON SHUMWAY, DOLORA COTTER, ANN JUMPER, JEAN MITCHELL, JUDITH IVES, individually and on behalf of all others similarly situated,

Plaintiffs,

against

THE CITY AND COUNTY OF DENVER, CAREER SERVICE AUTHORITY, CITY AND COUNTY OF DENVER, WILLIAM McNICHOLS, Mayor of the City of Denver, F. ARNOLD McDERMOTT, personnel director and chief executive officer, Career Service Authority, FRANCIS H. SALTER, Chairperson, Career Service Board, MARIAN H. ROSSMILLER, vice-chairperson, Career Service Board, RICHARD L. HARTMAN, member of the Career Service Board, WILLIAM R. GREENWOOD, member of the Career Service Board, JOHN DOE, member of the Career Service Board, and EDWARD F. BURKE, JR., President of the City Council of the City of Denver,

Defendants.

This case is a case certainly of substantial importance to the plaintiffs, it is a case of substantial importance to the taxpayers of the City and County of Denver, it is a case of substantial importance to the entire community, it is a case which is pregnant with the possibilty of disrupting the entire economic system of the United States of America. The case is one which states an unusual approach to employment of rates of pay. It's been a very interesting case. It's been a very well prepared case, it's been a very well presented case. Counsel seem more than happy to wind up their part of the case here today, and despite what I have said before, if they don't want to wait for the Supreme Court to make its guesses on *Bakke,* that's all right with me. I'm going ahead. I can decide the case today too. If they can argue it, I can decide it.

Accordingly, these will be the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure, but I shall adopt the procedure typically followed by Judge Sherman Christensen, and the oral findings that I make here today will be subject to grammatical corrections, editing and additions or omissions or improvement after I receive the Court Reporter's transcript. I shall not write any opinion, but when I receive the Court Reporter's transcript, I shall edit it, correct it, file it, and Counsel will be mailed a copy of the corrected Reporter's transcript.

The findings and conclusions will be effective for purposes of appeal when the edited and corrected reporter's transcript is filed with the Clerk of the Court, and that will give counsel a basis for their appeal.

The complaint here recites as to jurisdiction that the action is one seeking a declaratory judgment, injunctive relief and damages. It asserts that jurisdiction rests upon the Fourteenth Amendment of the Constitution of the United States, 42 United States Code Section 1983, and 42 United States Code, Section 2000 (e).

Of course, collaterally to that, jurisdiction rests on 28 United States Code, Section 1343 and 42 United States Code, Section 2000 (b).

It's probably well to have in the record what the pertinent portion of those jurisdictional provisions are. The Fourteenth Amendment of the Constitution of the United States is rather lengthy, of course, but the portion of it on which I understand the plaintiffs rely here is Section 1 of the Fourteenth Amendment and, more particularly, the clause, "No state shall make or enforce any law which shall abridge the privileges of immunity of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

I believe, and I expressly find, that the plaintiffs have stated a claim for relief under the Fourteenth Amendment, and I expressly find that I have jurisdiction of the claim made under the Fourteenth Amendment to the Constitution of the United States.

Next I come briefly, once more, to 42 United States Code, Section 1983. I have covered this before but it's probably well to have it again in the course of the findings.

I expressly find that under the principles of the *City* of *Kenosha v. Bruno,* 412 U.S. 507, and *Monroe v. Pape,* the predecessor case to *Kenosha v. Bruno*; (and *Monroe v. Pape* is to be found at 365 U.S. 167) there is absolutely no claim under 42 United States Code, Section 1983 available to the plaintiffs or to anyone else against a municipal corporation, the City and County of Denver; there is no claim for damages, there is no claim for injunctive relief. That will remain so unless and until the Supreme Court changes its mind.

I find expressly that there is no claim for damages against the City officials under 42 United States Code, Sec-

tion 1983 under the principles of *Procunier v. Navarette,* 46 Law Week 4144, and I find that the principles of *Wood v. Strickland,* 420 U.S. 308, preclude any possible action for damages against the City officials because, as I have heretofore found and as I reiterate, there is not a scintilla of evidence that the City officials have done anything other than act in total and complete good faith, and under plaintiffs' own theory in this case, it can hardly be contended that the City officials can be thought to have knowingly violated some well-established constitutional right.

Accordingly, I have no hesitancy in finding that under those cases there is no possibility of a damage claim against the City officials under Section 1983.

I have said that I will assume that there is an available remedy under 42 United States Code, Section 1983 against the City officials as individuals for injunctive relief and I do make that ruling for the purposes of, and only for the purposes of, this case. That ruling by me is not to be construed as any determination that I would make a similar ruling in a future case. It is not to be cited to any other judge of this court as a ruling by me on that subject, save and except as a ruling to become the law of this case. I decide that without intending to create any precedent whatsoever on the point and I do not want what I have said to be construed as precedent on that point for any future case. The reason I am doing this I am sure will become more apparent as I go along.

Additionally, the plaintiffs seek to recover under 42 United States Code, Section 2000 (e) which provides in pertinent part:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or priv-

ileges of employment because of such individual's race, color, religion, sex or national origin."

There is not any doubt at all that I have jurisdiction of this case under 42 United States Code, Section 2000 (e) and I expressly find and conclude that I do have jurisdiction of this case under 42 United States Code, Section 2000 (e).

The plaintiffs have expressly, emphatically and repeatedly abandoned any claim at all under the Equal Pay Act. I have not the slightest doubt but that I would have had full and complete jurisdiction to pass on any claims made under the Equal Pay Act, but I certainly am not going to reach out to assume jurisdiction over a claim which is not made.

The Equal Pay Act, 29 United States Code, Section 2006 (b) (1) [sic] reads as follows:

"No employer having employees subject to any provision of this section shall discriminate within any establishment in which such employees are employed between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays the wages to employees of the opposite sex in such establishment for equal work on jobs, the performance of which, requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."

The Bennett Amendment to 42 United States Code, Section 2000 (e) has been, at least by some courts, tied into the Equal Pay Act. It says:

"It shall not be an unlawful employment practice under this subchapter for any employer to differentiate on

the basis of sex in determining the amount of wages or compensation to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 2006 (d) ," which is what I just read.

I suppose that it's self-evident when one thinks about it why the plaintiffs have abandoned the claim under the Equal Pay Act. That Act, to permit recovery, requires discrimination within a particular establishment.

To sue under the Equal Pay Act, then, the plaintiffs would have to say that the City and County of Denver discriminated within its own group of employees, but the entire theory of the plaintiffs' case is in contradiction of that approach.

The entire theory of the plaintiff's case is that the defendant does not discriminate among its own employees, but rather that there is occupational discrimination which has come down through the centuries and that Congress intended that the Courts should take over the restructuring of the economy of the United States of America. Plaintiffs say, and I don't quarrel with this, I make no finding for or against them, but I certainly do not disagree with them, that their skills are such that in a truly egalitarian society, they would receive more money. At least I thought that was true. Until I looked up the word "egalitarianism." I thought the word meant that there should be complete equality among all persons. I thought that it was an economic theory of absolute equality, but I find not. According to Webster, and I cannot help but comment on this, but I do so simply because I think it's slightly humorous, Webster's Seventh New Collegiate Dictionary defines egalitarianism as "A belief in human equality, especially with respect to social, political and economic rights and privileges." So far so good. The next definition is, "A social philosophy advocating the removal of inequalities among *men*."

Webster's Third International Dictionary defines egalitarianism as "A belief that all *men* are equal in intrinsic worth and are entitled to equal access to the rights and privileges of their society."

I mention that simply to emphasize what we are confronted with here today is history. We're confronted with a history which I have no hesitancy at all in finding has discriminated unfairly and improperly against women. But Congress did not, in my judgment, decide that we were going to roll aside all history and that the Federal Courts should take over the job of leveling out centuries of discrimination. One can go to the Bible and find countless examples of discrimination. To me, the terrifying picture that would be painted if Courts were to get into this situation was best exemplified by Dr. Bardwell in response to a question or two I asked him.

I asked him to accept the assumption, which I believed to be true, that secretaries for the last 70 years have been predominantly female, that secretaries by and large are better trained and more highly skilled than salesmen, and that salesmen are predominantly male. But salesmen make more money. And I asked him if he thought that was sexual discrimination. He said that he did, and that corporations should have to pay secretaries more than salesmen.

So what he is saying is that I should open the Pandora's Box in this case of restructuring the entire economy of the United States of America. I am not going to do it. Some higher Court is going to have to take that step. I don't know how you would ever live with such a program.

The plaintiffs here say they want their pay to be compared with other occupations. Of course they do. If that were done, it would give them more pay. But I can find nothing in the law that requires that. It would be nice for the plaintiffs. It would be completely disruptive of our way of life, and we've got enough disruptions now.

I am unable to believe that the Congress of the United States has mandated that the job of every person in the United States be evaluated skill-wise, productive-wise and otherwise to the job of every other person, and that we have a completely new pay scale set up by some group of experts or pseudo experts. Let me assure you that you could never find any two experts who would be in complete agreement.

And if the Congress thinks that some Bureaucracy should be set up to fix the pay of everybody in the United States, I wish them well the first time they confront George Meany. I will guarantee you that isn't going to work.

I asked, and I was very sincere in my request, that some expert explain to me what one does or the Court is supposed to do when confronted with the impossible problem of trying to determine the relative worth of the services of an unorganized, and by "unorganized" I mean non-union, group, as compared to the negotiated pay of a strongly unionized group. I have no idea how that problem could ever be solved.

I know that if the Court were to order an increase in the pay of the unorganized group, the next round of labor negotiations would use that as a jumping off place. The Courts of this country would be deluged with that type of litigation, and there isn't a Judge in the United States, especially this Judge, qualified to set everybody else's pay. It would be an absolutely hopeless morass.

I have not approached this case without reading a little law here and there. I believe I understand the plaintiffs' position and arguments, and I think that for the sake of the Court of Appeals, I will just tell them what cases I am basically relying on without going into a great deal of detail.

Of course, I have read and studied carefully *McDonnell Douglas v. Green* — I'll come back to that later; *Dayton*

Board of Education v. Brinkman, 433 U.S. 406; *Washington v. Davis,* 426 U.S.229; *General Electric against Gilbert,* 429 U.S. 125; *United Airlines v. Evans,* 431 U.S. 553, which, by the way, as you all know, or many of you know, is a sex discrimination case involving the *United Airlines* stewardesses; *Califano v. Goldfarb,* 430 U.S. 199; *Franks v. Bowman Transportation Company,* 424 U.S. 747; *Albemarle Paper Company v. Moody,* 422 U.S. 406; *Dothard v. Rawlinson,* 433 U.S. 321. I think that's the end of the United States Supreme Court cases. Now — no, we've got *Hazelwood School District* — I want to comment on that — *v. the United States,* 433 U.S. 299; then we have *Muller v. United States Steel,* Tenth Circuit, 509 Fed. 2d. 923; *Hodgson v. Brookhaven Hospital,* 436 Fed. 2d. 719; *Christensen v. the State of Iowa,* 563 Fed. 2d. 353; *Schultz v. Wheaton Glass,* 421 Fed. 2d. 259; *Brennan v. Victoria Bank,* 493 Fed. 2d. 896.

I'm not going to review each of those cases individually, of course, but I am going to say that I can arrive at no conclusion other than that the Congress of the United States and the United States Supreme Court do not foresee that the Courts of this country are going to fix everybody's pay. Neither the Congress of the United States nor the United States Supreme Court, as I read the law, want Judges to run the country in that fashion. And I'll guarantee you I, for one, do not want any part of trying to run the country in that fashion. Because that's not our way of life.

Congress cannot, and never has been able, to repeal the law of supply and demand. And the situation, unfortunate that it may be, is that the supply of nurses is very large as compared to the demand, and it puts the nurses in a somewhat disadvantageous negotiating position. But, the discrimination, as I see it, is not a discrimination in the nursing profession against females.

Plaintiffs' very statistical evidence demonstrates that if there is discrimination within the nursing profession, it is in favor of females because females outnumber males by a tremendous percentage.

The discrimination, to me, must be in other occupations — occupations which nurses have not gotten into. Traditionally, I am convinced they have been discriminated against in the past in those professions. I have found no evidence that they are discriminated against in those professions today.

I don't think that Mr. McDermott would say for a moment that he does not think that history shows discrimination against females in many occupations. I don't think that he would quarrel with that at all. But the discrimination is not present today on the record made in this case. I think the City has done an exceptionally fine job of attempting to establish a fair pay system. I am confident that if we had had 50 experts testify, all 50 of them would have found something in the City system to find fault with. That's part of being an expert. You aren't a fully qualified expert unless you disagree with what some other expert says. The only way you prove your expertise is to refuse to go along.

I might make some changes in the City system, I might not, but I certainly don't think that there has been any showing of discrimination.

I come now to the question of whether *McDonnell v. Green* does or does not apply in a case such as this and I don't know whether it does or whether it doesn't. It was a racial case, of course, as we all know. It was a firing case rather than a pay case. It was a case in which McDonnell Douglas said they fired Mr. Green because he participated in a disruptive demonstration that developed into a minor riot. Mr. Green said that wasn't why they fired him at all: that they fired him because he was black.

The Supreme Court of the United States helpfully said on those facts:

"The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination."

I suppose that includes sex discrimination. The opinion continues:

"This may be done by showing (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job which the employer was seeking applicants; (3) that despite his qualifications, he was rejected and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

Later they say: "If he proves that, then the burden shifts to the employer to show some legitimate non-discriminatory reason for the employer's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner is assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination."

Then they go ahead and say that the burden shifts back and that Mr. Green can show it was all a pretext. I don't know how you apply that language to this case, but I'll try.

I will say that based upon the statistical evidence which has been here introduced, I think the plaintiffs may have met — no, that they did meet their burden of proof, that there is racial discrimination within the nursing profession. The trouble is they proved that there's discrimination, statistically, in favor of females.

Then I suppose they may have, if you look at it the other way under their theories, they have — I think they have established that, by and large, male-dominated occupations probably pay more for comparable work than is paid in the occupations dominated by females.

I seriously doubt that that establishes any Title VII violation, and I seriously doubt that that establishes any equal pay violation, if that were before me, and I am confident it *does not* establish any Fourteenth Amendment violation.

However, applying this floating burden of proof of *McDonnell Douglas,* I think that if the statistical evidence gets the plaintiffs over the hurdle to shift the burden of proof to the City, the City has clearly picked up the cudgel and demonstrated these things. It has demonstrated it's made a good faith effort to establish a fair pay plan and that as part of it it is paying the prevailing wage as it is required to do under the City Charter.

Let me digress here. I expressly do not find that it is a defense to any type of a discrimination case to say that everybody else is discriminating, so so can I. I totally and completely reject any such fool argument as that, and I don't suggest that the argument has been made.

There is another major problem in trying to apply the plaintiffs' philosophy to this case. Plaintiffs want to structure their pay utilizing a comparison to other occupations, albeit they are male-dominated occupations. I don't think the Congress of the United States intended that equality was to be such a flexible, fluctuating, impossible, imponderable thing as would result from that.

If the plaintiffs be correct in their position, they would be entitled to have their pay fixed by a comparison of their salary with the salaries paid to other occupations. I use, by way of example, because it came up in the testimony,

real estate appraisers. I suppose that exactly — if the plaintiffs are right — exactly the same principles must apply to all hospitals, but I challenge plaintiffs to find me a hospital that has got in its employ a real estate appraiser save and except the City and maybe a few other government hospitals.

So using this as an absurd example, if we were to compare the nurses' pay to real estate appraisers, and if that were to result in an increase in the nurses' pay, their colleagues employed at St. Luke's and St. Joe's would not be entitled to the increase because if this be the way pay is going to be determined, it's going to have to be by comparison within the employer organization, if plaintiffs' theories are followed.

To me the defendants' approach to it is much fairer. Because it might well be that in some organizations plaintiffs' approach would result in a reduction in the pay of the female dominated group, or male dominated group for that matter. And the defendants say, no, this country got where it got — I don't know whether that's good or bad — but it got here by meeting competition. And the defendants say they are going to pay the City nurses in the general range of what the labor market pays them. To me that's a much fairer approach, and I cannot conceive of how a system could work where a group of employees' pay was to be determined by comparison with the other jobs available in that employer's economic structure.

The overall result here, in my judgment, would be absolutely chaos in the economy of the United States of America if any such program ever be adopted. I cannot help but think that the enactment of the Equal Pay Act, which has been rejected by the plaintiffs as a vehicle for relief, is pretty strong proof that Congress does not interpret Title VII, 1983 or the Fourteenth Amendment the way the plaintiffs do. If the plaintiffs are correct in their

interpretation, the Equal Pay Act was really pretty much a waste of time. It wasn't needed. The Equal Pay Act, as I see it, accomplished nothing if plaintiffs are correct. In fact, it probably detracted from the rights available to plaintiffs if they correctly interpret 1983, the Fourteenth Amendment and Title VII.

Let's not forget that the Supreme Court said, in *Washington v. Davis,* at Page 246, "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenge practices. It is necessary, in addition, that they be 'validated' in terms of job performance in any one of several ways, perhaps by ascertaining the minimum skill, ability or potential necessary for the position at issue and determining whether the qualifying tests are appropriate for the selection of qualified applicants for the job in question."

The Supreme Court did not say that the thing to do was to go out and weigh one job and its skills against another. I don't think that is ever going to become the law in this country. I think that Congress has had every opportunity in the world to come up with that result, and I don't think Congress wants any part of it.

The opinion of the Court in *Hazelwood School District v. the United States,* of course, is very, very important here. Once more, that's 433 U.S. 299. It points out, of course, that originally Title VII applied only to private employers but that it was amended to include public employers. And then it said statistical disparity, particularly when viewed against the background of teacher hiring procedures that *Hazelwood* had followed, was held to constitute a prima facie case of a pattern or practice of racial discrimination. That's why I said I'm willing to accept statis-

tical evidence here that there has been discrimination. But discrimination within the nursing profession has been in favor of women, and I seriously question their standing to challenge discrimination in other occupations if they haven't applied for a job there, and there isn't a scintilla of evidence that they have. However, my views of standing and the United States Court of Appeals for the Tenth Circuit's views of standing seem to differ. I get along pretty well with Judge Breitenstein in the area, but not very well with certain other Judges up there. But be that as it may, I don't think the nurses have a bit of standing to challenge discrimination in any profession other than nursing.

Accordingly, just for the sake of getting the issues squarely before the Court of Appeals, I expressly find and conclude that the plaintiffs have no standing to challenge discrimination on the basis of sex in any profession other than the nursing profession or occupations closely related to the nursing profession on the basis of job requirements. And I find that the nurses have no standing to challenge any discrimination, if there be discrimination, in totally unrelated occupations.

I come now to the case that has been bandied about so much and Counsel seem to read it somewhat differently among themselves. *Ammons v. Zia Company,* 448 Fed. 2d. 117. I note that the *Zia Company* is probably the most prominent litigant in the Tenth Circuit on Title VII matters. I suspect it has had more cases in the Court of Appeals than any other company. Probably because it's almost a Government subsidiary, I guess. The only one I know of which hasn't been decided by the Court of Appeals yet is one I tried in New Mexico, so I'm waiting with bated breath for that one.

Anyway, in *Ammons v. the Zia Company,* the opinion was written by Judge Aldisert of the Third Circuit sitting by designation. The Court was composed of Judge Aldisert,

Judge Breitenstein and Judge Barrett. It seems to me the Tenth Circuit has pretty squarely passed upon the problem of the Bennett Amendment and Title VII and the interrelationship between the Bennett Amendment and Title VII. Let me quote from Page 120 of the *Ammons v. Zia* opinion. "Moreover, to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work. Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they be substantially equal", citing *Schultz v. Wheaton Glass.* "Thus, in the instant case, appellant was obliged to demonstrate that the work performed by the three higher paid male workers was 'substantially equal' to that performed by her." I full well understand that Mr. Barnes says that that applies only in a one on one situation, but that's something the Court of Appeals is going to have to instruct me on.

I expressly find that the plaintiffs failed to prove any pay differential based on sex for the performance of substantially equal work. This was clearly available to them under the Equal Pay Act and they elected not to follow it, for reasons I can understand. But if their position is that they did try to prove it, I find there was a total failure of proof. And indeed there must be. If we are to follow the plaintiffs' theory, what is the Court supposed to do when deciding on the equality of pay of doctors and lawyers? The doctor's education is a little bit longer than a lawyer's, but as to the lawyers who have been law clerks, it really isn't. Both are licensed. Lawyers can advertise. Maybe doctors can pretty soon, I don't know. But I think a statistical study will show that doctors make a lot more money than lawyers. And there are probably two reasons for that. One is a more tightly controlled union which sets up the limitations on education. And the other one is the ever-present threat of malpractice litigation which struck the doctors first but is

rapidly catching up with the lawyers. Malpractice litigation which has tended to price medical services out of sight, and legal services are soon going to follow.

Going back to the *Ammons* case, Judge Aldisert continued:

"Congress did not intend that a naked averment of job discrimination would suffice to establish a prima facie case under the Equal Pay Act. It required factual support of an accusation that the employer paid the aggrieved employees of the opposite sex in such establishment for equal work, on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."

That, of course, was under the Equal Pay Act. That claim has been abandoned, but insofar as the Equal Pay Act is incorporated into Title VII, I find that there was a total failure of proof on the part of plaintiffs.

Hodgeson v. Brookhaven Hospital, of course, we are most familiar with. That was the case decided by Judge Sarah Hughes. Let me read from the — I mean a lower court decision by Judge Sarah Hughes. Let me read from Judge Ainsworth's opinion in that case.

"At the close of the testimony, the trial judge had before her evidence which, if credited, indicated that even the least experienced aides and orderlies were called on from time to time to perform duties beyond the ambit of routine patient care. She had to determine whether those duties were distributed evenly among all aides and all orderlies so as to warrant comparison of aides and orderlies as classes. And, if so, whether as a class the work of the aides was substantially equal to that of the orderlies in terms of skill, effort, and responsibility.

"Focusing simply on the individual tasks performed over and above routine patient care, it seems clear that

the trial judge was justified in finding, in effect, that those tasks performed only by aides require as much skill as the most skilled tasks performed by orderlies, and that the additional duties assigned to both groups involved substantially equal responsibility.

"The validity of the judgment thus depends on the application of the equal effort criteria."

I find that in this case, in so far as it is appropriate, that there is no substantial evidence that the tasks performed by any other group, either as regular or as additional duties, involves substantially equal responsibility with those of the nurses.

I do not find that there has been any discrimination at all between occupations performing substantially equal work, and I totally reject the concept that one can compare the job skills, the professional skills and the responsibilities of the nursing profession with the administrative skills of some totally unrelated group. There is no expert in the United States of America who can create anything other than consternation if this ever be attempted.

It seems to me that *Christensen v. State of Iowa* by the Eighth Circuit, not yet a year old, 563 F.2d 353, is pretty close to this point, and I'm inclined to think that the reasoning of Judge Bright, joined in by Judge Lay and Miller, is, I think, unanswerable.

There, of course, the plaintiffs were employed by the University of Northern Iowa. Quoting from the opinion:

"The University of Northern Iowa contends, and the district court agreed, that appellants did not establish entitlement to relief under Title VII because appellants failed to show that work performed by clerical employees was substantially similar to that performed by physical plant employees."

I interject, here we have got exactly the same thing. We are trying to compare one type of occupation with another.

"UNI claims that the last sentence of 42 United States Code, Section 2000 (e) – (h), commonly known as the Bennett Amendment, requires a showing of 'equal work' in terms of sex discrimination in compensation. Appellants contend that the Bennett Amendment does not place this limitation on Title VII.

"We need not resolve the conflict presented over the interpretation of the Bennett Amendment for we are convinced that, apart from the Bennett Amendment, appellants failed to make a prima facie case.

"Appellants have failed to demonstrate that the differences in wages paid to clerical and plant employees rested upon sex discrimination and not on some other legitimate reason."

I interrupt, I expressly find that the plaintiffs here have failed to demonstrate that the difference in wages paid to the nurses and paid to unrelated occupations, whether they be male-dominated, female-dominated, or of equal mix, I expressly find that there has been no showing of any differences based directly or indirectly on sex discrimination, save and except as history has created a lower pay scale for certain occupations.

I expressly find that the City has not excluded any male from the profession of nursing based upon sex, and I expressly find that the City has not excluded any female from any other occupation based upon sex, and I expressly find that the City has made no determination as to the wages of any group based upon sex.

Continuing with the case – wait a minute, I've got to get that one last clause in that case.

I expressly find that the City fixed its wages based upon a conclusively demonstrated legitimate reason, namely, meeting competition.

I expressly find that if the City's competitors were to raise the salaries of nurses, I have no doubt at all that the City would raise the salaries of nurses because they would have to.

Now I'll read from the case:

"The evidence shows that UNI paid higher wages to plant workers because wages for similar jobs in the local market than the wages established under the Hayes System."

I think I've already found the essential facts on that.

"The University drew no distinction between male and females in the plant department."

I have already found that the City draws no distinction between male and female employees.

"Appellants contend that UNI's policy violates Title VII by perpetuating wage differences resulting from past discrimination."

The precise contention made by plaintiffs here.

"They argue that long-standing discriminatory practices in the local job market, which channeled women workers into a small number of jobs, resulted in an over supply of workers and depressed wages in those jobs."

Exactly the same contention as that made here.

"Therefore, UNI's reliance in part upon prevailing wage rates and determining beginning pay scales for jobs of equal worth to the university serves to carry over the effects of sex discrimination in the marketplace into the wage policies of the college."

The precise contention that is made here.

"This argument misconstrues the purposes of Title VII. The federal policy embodied in Title VII is that individuals shall be entitled to equal opportunities in employment on the basis of fitness and without discrimination because of race, color, religion, sex or national origin."

I expressly find that the City does afford the plaintiffs and all other females equal opportunities in employment on the basis of fitness and without discrimination because of race, color, religion, sex, or national origin. I find no credible evidence in the case to the contrary.

"This policy," I continue, "is reflected in the statute's title 'Equal Employment Opportunity' as well as in the preamble to Executive Order No. 11478, its counterpart in the area of federal employment."

Then they quote from that: "It has long been the policy of the United States government to provide equal opportunity in federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin.

"The policy behind Title VII was described by the Supreme Court in *Griggs v. Duke Power Company,* 401 U.S. 424," and they quote: "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

"The court reiterated that policy in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792," and they quote: "The language of Title VII makes plain the purpose of Congress to assure quality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."

The quality of opportunity is not at issue here. Instead, appellants seek a construction of Title VII that may establish a prima facie violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market."

I interject that is the exact contention here made.

"Appellants' theory ignores economic realities."

I interject that plaintiffs' theory ignores economic realities.

"The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."

I find that the City's key class system was set up in absolute good faith. I am sure that if anyone were to set up a key class system, it would be subject to attack. The attacks have been made on the City's system. I find nothing inherently wrong with the City's key class system. I find that it was done after careful study and thought and evaluation by experts in the field. I find that the criticism which is made of it is totally insufficient to in any way affect its validity. I find that the City, in setting up its system, in good faith attempted to fix wages for genuinely different work classifications.

I think that to structure the classification system in the way plaintiffs seek to structure it would be unrealistic, and although it might help them, any such policy would result in more damage in the long run than it would help. If we are to have, in this country, the legendary 1984 as expressed in the book, the Big Brother looking over our shoulder who is going to dictate our day-to-day ways of life, it's going to have to come from the Congress. It's not going to come, at least, from this Court. I'm a great believer in preventing discrimination, whether it be based on sex, race, color or religion. But I don't find any such discrimination here of a current date.

I have said, and I repeat, historically there has been discrimination against females. I condemn it. It's wrong. But Congress has not seen fit to try to bring it all down to date. And Congress has not said that the Courts are supposed to correct all of history. The Courts aren't qualified to do it, the Courts ought to stay out of it. And if history is that bad, the plaintiffs should direct their appeals to the Legislature, the Congress. Perhaps Congressional people are smart enough to solve it. I'm surely not.

I don't think plaintiffs have proven any grounds for relief in this case, and accordingly, the Clerk shall prepare a judgment denying plaintiffs' relief. Contrary to the expressed provisions of the rule, and in accordance with what I have said earlier, this judgment should be prepared forthwith as the rule says, but it is not to be signed forthwith. It is to be signed by the Clerk contemporaneously with my signing of the Reporter's transcript of these oral findings and conclusions. Literal compliance with the rule, I'm afraid, would give the plaintiffs complications on when the time for appeal runs. And I certainly don't want to do that.

Appendix A

Opinion of the Court of Appeals
(Decided April 21, 1980)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

April, 1980, Term

No. 78-1499

MARY LEMONS, MARGARET D. LEWIS, MARILYN SHAHAN, LOIS CADY, SHARON SHUMWAY, DOLORA COTTER, ANN JUMPER, JEAN MITCHELL, JUDITH IVES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

against

THE CITY AND COUNTY OF DENVER, CAREER SERVICE AUTHORITY, CITY AND COUNTY OF DENVER, WILLIAM McNICHOLS, Mayor of the City of Denver, F. ARNOLD McDERMOTT, personnel director and chief executive officer, Career Service Authority, FRANCIS H. SALTER, Chairperson, Career Service Board, MARIAN H. ROSSMILLER, Vice-Chairperson, Career Service Board, RICHARD L. HARTMAN, member of the Career Service Board, WILLIAM R. GREENWOOD, member of the Career Service Board, JOHN DOE, member of the Career Service Board, and EDWARD F. BURKE, JR., President of the City Council of the City of Denver,

Defendants-Appellees.

Appeal from the United States District Court for the District of Colorado

This is an action brought by several nurses who were employed by the City of Denver. The suit against the City seeks relief for sex discrimination under the Civil Rights Act, under 42 U.S.C. § 1983, and the fourteenth amendment. As it reaches us this is not an equal pay case, 29 U.S.C. § 206(d), A class was certified. The trial court found for the defendant City.

The challenge is to the City classification and pay plan (which covers all its employees) as it applies to plaintiffs. The plan seeks to equalize the pay for City employees with pay for like jobs in the community. The City has established hundreds of job classifications with written descriptions. Among these are "key classes" which are selected because they can be accurately compared with non-City positions, and also City jobs which are useful and significant within the City classifications to evaluate the comparisons so made with the outside jobs. The key classes include "Graduate Nurse I," and "Licensed Practical Nurse I." Key classes are "surveyed" each year to make the comparison with what is going on in the community.

The application of the City method places the City nurses on a pay parity with other nurses in the community. The consequences are the same for all other City classifications.

The basic position of plaintiffs is that they do not want the comparison to be with nurses in the community. They argue that historically nurses have been underpaid because their work has not been properly recognized and because nurses have almost universally been women. Thus the plaintiffs urge that the City should not mirror this condition which prevails in the community and so perpetuate it in the City employment practices. Since the City does

follow the community scale they argue that this discrimination is incorporated in the City's plan. Plaintiffs thus assert that their positions should instead be compared with jobs other than nurses. This, they urge, should be accomplished by placing them in a different City classification described as "General Administrative Series." Under their analysis, this would remedy the situation by making the comparison with non-nursing positions.

In summary, the suit is based on the proposition that nurses are underpaid in City positions, and in the community, in comparison with other and different jobs which they assert are of equal worth to the employer. The relationship of pay for nurses to pay for other positions is obviously a product of past attitudes, practices, and perhaps of supply and demand. The record shows that it became a part of the economic balance and relationships prevailing in the community among the myriad of positions in the job market.

This type of disparity was not sought to be adjusted by the Civil Rights Act, and is not within the equal protection clause. The courts under existing authority cannot require the City within its employment to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship. Also, this cannot be done in total disregard of conditions in the community. The court in Christensen v. State of Iowa, 563 F.2d 353 (8th Cir.), said of this: "We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."

It thus appears that the plaintiffs are seeking relief far beyond that contemplated by Congress or the Constitution. It is clear that the Denver City officials acted in good faith. The trial court so found and found also that "the City draws no distinction between male and female employees." Plaintiffs are not seeking equality of opportunity in their

skills as contemplated by Title VII, and described in McDonnell Douglas Corp. v. Green, 411 U.S. 792, but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it.

In the meantime, we can consider *wage* discrimination claims which involve departures from equal pay for equal work. This would be applicable to both the Equal Pay Act and Title VII. We applied the "equal work" concept to Title VII in Ammons v. Zia Company, 448 F.2d 117 (10th Cir.) The equal pay for "comparable work" concept had been rejected by Congress in favor of "equal work" in 1962. The Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way as it applies in the Equal Pay Act. Our Ammons v. Zia Company, 448 F.2d 117 (10th Cir.), was a 1971 sex discrimination decision under Title VII of the 1964 Act, 42 U.S.C. § 2000e. We there said: "Moreover, to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work." The plaintiffs are not seeking relief within this concept, and are instead well beyond the limits there describd.

The case before us is much like Christensen v. State of Iowa, 563 F.2d 353 (8th Cir.), the opinion which was quoted by the trial court at some length. There, a comparison and equality was sought between women clerical employees at a university with employees in its physical plant department. The same arguments were made there as in the case before us, including the perpetuation of discrimination existing in the market. The Eighth Circuit held that no cause of action had been established and indicated the theory was far beyond the existing statutory law and the application of constitutional provisions.

The Supreme Court has always emphasized the barriers to employment opportunities, and the necessity to provide equal employment opportunities. This after all is the purpose of the legislation. *See again* McDonnell Douglas Corp. v. Green, 411 U.S. 792, and Griggs v. Duke Power Co., 401 U.S. 424.

The plaintiffs did not show that the work in the classification they sought was equal to that in which they found themselves. The only showing was that the City's system of pay and classification provided equal pay for equal work. The proof demonstrated that the City provided equal opportunities for women including plaintiffs and the class. The parity plaintiffs seek is not a remedy which the courts can now provide.

AFFIRMED.

Appendix B

Statutes Involved

Title VII of the Civil Rights Act of 1964
42 U.S.C. §2000-2

(a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discrimi-

nate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Equal Pay Act
29 U.S.C. §206(d)

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.